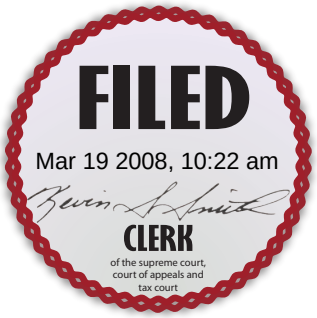

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IN THE
COURT OF APPEALS OF INDIANA

ROGDRICK STEWART,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0706-CR-463
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0412-FD-410

March 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Rogdrick Stewart appeals his convictions for Class D felony dealing in marijuana, Class D felony maintaining a common nuisance, and Class C felony obliterating an identification mark. We affirm.

Issues

Stewart raises two issues, which we restate as:

I. whether the trial court properly admitted evidence obtained during a search of his house; and

II. whether the trial court properly denied his motion to dismiss.

Facts

On December 23, 2004, two detectives with the Anderson Police Department were conducting surveillance of a house in Anderson. The detectives decided to conduct a "knock and talk." They knocked on the door and used their badges to identify themselves as police officers. Stewart answered the door and invited them inside the house. Upon entering, the detectives immediately noticed the smell of burnt marijuana. They also heard noises coming from another area of the house. Stewart told the detectives that his two brothers were also in the house. Detective Kevin Early walked through the house and heard a toilet running. He looked in the toilet and observed plant material that he believed to be marijuana.

The detectives patted down the three men and allowed the brothers to leave the house. After Stewart was Mirandized, the detectives asked Stewart if they could search the house. He agreed to the search, and another police officer went to his squad car to get

a written consent to search form. While they were waiting for the officer to return with the form, Stewart indicated to Detective Early that there was marijuana in the attic. Stewart showed Detective Early the attic access, and Detective Early stuck his head inside the attic, where he observed a plastic bag.

The other officer returned, Stewart signed the consent to search form, and the plastic bag was retrieved from the attic. The plastic bag contained loose marijuana and three individual baggies of marijuana. Digital scales, $610 in cash, and a handgun were also retrieved during the search. The last digit of the serial number on the gun had been scratched out by something and was illegible.

On December 27, 2004, the State charged Stewart with Class D felony dealing in marijuana, Class D felony maintaining a common nuisance. The information was later amended to include a charge of Class C felony obliterating an identification mark.

Prior to trial, Stewart moved to suppress the evidence obtained during the search, which was denied. Stewart also moved to dismiss the maintaining a common nuisance and the obliterating an identification mark charges after he was found to have violated his probation. This motion was argued before the trial started and was also denied. Prior to trial, Stewart also renewed his motion to suppress. This motion was again denied, and Stewart's continuing objection was noted. Stewart was convicted as charged. He now belatedly appeals.

Analysis

I. Admission of Evidence[1]

Stewart argues that the trial court improperly admitted evidence associated with the drugs and the gun at trial. Although Stewart originally challenged the admission of the handgun in a motion to suppress, he appeals following the admission of the evidence at trial. Accordingly, the issue is framed as whether the trial court abused its discretion by admitting the evidence at trial. Cole v. State, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007). "Our standard of review for rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by an objection at trial." Id. We do not reweigh the evidence, and we consider conflicting evidence in the light most favorable to the trial court's ruling. Id. We also consider uncontroverted evidence favoring Stewart. Id.

Stewart argues that the detectives' "uninvited, warrantless entry" into his home was illegal. Appellant's Br. p. 10. Contrary to Stewart's characterizations, this is not a case in which the detectives demanded entry or barged into Stewart's home without a warrant or probable cause. Instead, because the detectives were invited into Stewart's home, this case is better characterized as a "knock and talk."

It is generally settled that, "[i]n response to a 'knock and talk' residents have the right to deny officers admission and to refuse to answer questions." Hardister v. State, 849 N.E.2d 563, 570 (Ind. 2006) (citing Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.

[1] Stewart did not provide us with a transcript of the suppression hearing. Our analysis is based on the evidence admitted at trial.

Ct. 673, 676 (2000); Cox v. State, 696 N.E.2d 853, 858 (Ind. 1998)). "If residents exercise this right, officers generally must leave and secure a warrant if they want to pursue the matter." Id.

Notwithstanding the possibility of misuse, "we are persuaded by the case law of the majority of other jurisdictions holding that the knock and talk investigation does not per se violate the Fourth Amendment." Hayes v. State, 794 N.E.2d 492, 498 (Ind. Ct. App. 2003), trans. denied.

> "Not every confrontation between 'policemen and citizens' amounts to a Fourth Amendment 'seizure' of persons." State v. Carlson, 762 N.E.2d 121, 125 (Ind. Ct. App.2002) (quoting Terry v. Ohio, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). "'Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude a "seizure" has occurred.'" Id. A seizure does not occur simply because a police officer approaches a person, asks questions, or requests identification. Id.

Id. at 496. In determining whether the detectives' actions amounted to an illegal seizure of Stewart, we consider whether, under the facts presented, a reasonable person would have felt free to refuse entry of the detectives. See id. at 496 (summarizing what constitutes a seizure under the Fourth Amendment).

Here, the detectives were wearing badges around their necks when they knocked on Stewart's door. Stewart looked out of a window, and one of the detectives raised his badge, showing it to Stewart. Stewart opened the door, and the detectives introduced themselves as police officers. Stewart, "responded politely saying come in, sir." Tr. p. 63. The officers then entered the house. In this case, as in Hayes, there is no evidence

that the detectives pounded on Stewart's door or had their weapons drawn when he answered the door. Hayes, 794 N.E.2d at 498. Further, there is no evidence that the detectives raised their voices or demanded that Stewart let them into his house. See id. Considering the totality of the circumstances, we cannot conclude that an illegal seizure occurred as a result of the "knock and talk." See id. Stewart has not established that his Fourth Amendment rights were violated.

Stewart next argues:

> the issue of whether consent to search occurred prior to or after the search . . . is merely academic in this case. The detectives failed to advise Defendant of the right to assistance of counsel in deciding whether to consent to a search and therefore the timing of the consent form is irrelevant. The detective had already field tested the plant substance found in the toilet and did a body search of the Defendant, the Defendant was under arrest.

Appellant's Br. p. 12. With no analysis, Stewart cites to and describes the facts of Pirtle v. State, 263 Ind. 16, 29, 323 N.E.2d 634, 640 (1975), in which our supreme court held "that a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent."

Without more, Stewart has waived this alleged error. Stewart has failed to provide us with a cogent argument establishing that he was in custody and that the detectives conducted an unlawful search prior to informing him of his right to consult with counsel regarding the search. See Ind. Appellate Rule 46(A)(8); Boyd v. State, 866 N.E.2d 855,

857 n.1 (Ind. Ct. App. 2007) (noting that the failure to put forth a cogent argument acts as a waiver of the issue on appeal), trans. denied.

Waiver notwithstanding, Stewart has not established that his constitutional rights were violated. Here, Stewart had been Mirandized and was aware of his right to remain silent. The detectives then asked for consent to search Stewart's house, Stewart agreed, and another officer went to retrieve a consent to search form from his squad car. While waiting for the other officer to return, Stewart volunteered to Detective Early that there was marijuana in the attic and showed him where the attic access was. Detective Early stuck his head into the attic and observed a "plastic shopping sack." Tr. p. 73. Detective Early did not seize the bag or look inside of it until after Stewart signed the consent to search form.

Stewart voluntarily, without prompting by the police, offered information regarding the location of the marijuana while the police officers were retrieving a consent to search form that advised Stewart of his right to consult with counsel. This is not a circumstance in which the police happened across the marijuana after Stewart consented to a search uninformed of his right to counsel or in which they coerced Stewart to disclose the location of the marijuana. A suspect who has been Mirandized, spontaneously admits to the location of the drugs, and invites a police officer to view them should not be permitted to later claim that he or she was not advised of his or right to counsel prior to the police officer viewing the contraband. Under these facts, the

police officers acted reasonably. Stewart has not shown that the trial court improperly admitted the evidence.[2]

II. Motion to Dismiss

Stewart argues that the trial court should have dismissed the Class D felony maintaining a common nuisance and the Class C felony obliterating an identification mark charges following the revocation of his probation. We review a trial court's denial of a motion to dismiss for an abuse of discretion. Haywood v. State, 875 N.E.2d 770, 772 (Ind. Ct. App. 2007). "An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances or when the trial court has misinterpreted the law." Id.

On March 14, 2005, the probation department recommended the revocation of Stewart's probation. The allegations supporting the revocation of probation included the December 23, 2004 offenses and a urine screen that was positive for cannabinoids. The trial court's basis for revoking Stewart's probation was his possession of marijuana associated with this offense and the "dirty screen." Exhibit 19. The trial court specifically did not make any findings regarding the maintaining a common nuisance and

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[2] Stewart claims that his encounter with the police was an "investigatory stop" that was illegal because it was based on an anonymous tip. Appellant's Br. p. 8. He states, "In this case it is obvious that the Detectives received an anonymous tip and proceeded to set up and conduct surveillance." Appellant's Br. p. 8. To the contrary, however, it is not obvious that this case involved an anonymous tip and Stewart does not cite to any specific evidence of an anonymous tip in the transcript. Stewart also appears to argue that the evidence of the anonymous tip was inadmissible under the Indiana Constitution and Litchfield v. State, 824 N.E.2d 356 (Ind. 2005). Because of his failure to support these arguments with citations to the record and cogent argument, these issues, too, are waived. See Ind. App. R. 46(A)(8).

obliterating an identification mark allegations as a basis for the revocation of Stewart's probation. See id.

Stewart claims that because his probation was revoked, the doctrines of collateral estoppel and res judicata bar the State from prosecuting the maintaining a common nuisance and obliterating an identification mark charges. Stewart's argument is confusing and seems to implicate the doctrine of double jeopardy instead of the doctrines of collateral estoppel and res judicata. Nevertheless, we address his arguments and disagree with his assertions that the doctrines of collateral estoppel and res judicata bar criminal prosecution following a probation revocation.

To apply the doctrine of collateral estoppel, we engage in a two-step analysis. Reid v. State, 719 N.E.2d 451, 457 (Ind. Ct. App. 1999), cert. denied, 531 U.S 995, 121 S. Ct 489.

> We must first determine what the first judgment decided, and then examine how that determination bears on the second case. Determining what the first judgment decided involves an examination of the record of the prior proceedings including the pleadings, evidence, charge and any other relevant matters. The court must then decide whether a reasonable jury could have based its verdict upon any factor other than the factor of which the defendant seeks to foreclose consideration. If the jury could have based its decision on another factor, then collateral estoppel does not bar relitigation.

Id. (citations omitted).

Not only did Stewart fail to provide us with a full transcript of the probation revocation hearing, but it is clear that the fact-finder based the revocation of Stewart's probation on facts other than the allegations of maintaining a common nuisance and

obliterating an identification mark. The trial court specifically explained that the probation revocation was based on the possession of marijuana and the urine screen. Based on Reid, collateral estoppel does not bar relitigation.

As Stewart acknowledges, "Res judicata dictates that 'a judgment rendered on the merits is an absolute bar to a subsequent action between the same parties or those in privity with them on the same claim or demand.'" Smith v. State, 825 N.E.2d 783, 789 (Ind. 2005) (citation omitted). Here, there was no prior judgment on the merits on the maintaining a common nuisance and obliterating an identification mark charges. At the probation revocation hearing, the trial court stated that it was not making a finding regarding those allegations. There is no indication that the trial court acquitted Stewart or otherwise determined that he did not commit those offenses at the probation revocation hearing. The litigation of Stewart's guilt as to these offenses is not barred by the doctrine of res judicata. The trial court properly denied Stewart's motion to dismiss.

Conclusion

The trial court properly admitted evidence from the search and properly denied Stewart's motion to dismiss. We affirm.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.